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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

LOUIS CHARLES BORGEN,

Defendant and Appellant.

D069347

(Super. Ct. No. SCD260882)

APPEAL from a judgment of the Superior Court of San Diego County, Michael T. Smyth, Judge. Affirmed.

Heather L. Beugen, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Christopher P. Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

Louis Charles Borgen was charged in a one-count information with burglary of an inhabited dwelling house on or about February 10, 2015, in violation of Penal Code<sup>1</sup> sections 459 and 460. The information also alleged that another person, other than an accomplice, was present in the residence during the burglary within the meaning of section 667.5, subdivision (c)(21), and that Borgen previously had served a prior prison commitment (prison prior) for a 2004 burglary conviction (§ 459) and a 2006 conviction for receiving stolen property (§ 496, subd. (a)), within the meaning of sections 667.5, subdivision (b), and 668.

On the day set for the commencement of the jury trial, the trial court dismissed the prison prior allegation on the prosecution's motion. The jury found Borgen guilty of first degree burglary as charged and found to be true the allegation that another person, other than an accomplice, was present during the burglary. On November 20, 2015, the court sentenced Borgen to the midterm of four years in state prison.

Borgen appeals, contending the court prejudicially erred by admitting irrelevant and unduly prejudicial evidence that the police found pliers, wire cutters, and flashlights (hereafter sometimes referred to as the burglary tools) in the backpack he was carrying when he was detained in the vicinity of the burglarized residence.

We will assume, without deciding, that the court's admission of the burglary tools in evidence was erroneous, but conclude that any such error was harmless under the

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise specified.

applicable harmless error standard announced in *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*). Accordingly, we affirm the judgment.

## FACTUAL BACKGROUND

### A. *The People's Case*

On the night of February 9-10, 2015, Sierra Moreno and her friend, Karen Rasmussen, were having a sleepover at Moreno's two-story townhouse in the 3000 block of Broadway in San Diego. Moreno's roommate, Danielle Garcia, was not home that night. Before she left, Garcia turned off the lights in her bedroom on the first floor, and then she closed her bedroom door.

When Moreno and Rasmussen entered the townhouse at around 9:00 p.m. that night, they closed the front door behind them, but they could not recall whether either of them locked it. Moreno noticed that Garcia's bedroom door was closed and the light turned off. After they watched a movie downstairs, Moreno and Rasmussen went upstairs after midnight to listen to some loud music.

A few hours later, at around 3:00 a.m., Rasmussen went back downstairs to use the bathroom and get ready for bed. She discovered the front door was open. Rasmussen called to Moreno upstairs asking her why the front door was open, and Moreno came downstairs. Moreno thought Garcia had returned to get some of her clothes.

With all the lights on downstairs, Moreno then walked into the kitchen to get a snack while Rasmussen remained in the living room. Suddenly Moreno and Rasmussen saw a man open Garcia's bedroom door and walk out, facing them. The man was zipping

up a black backpack, and the light was off in Garcia's bedroom as he was walking out of the room.

Moreno asked the man who he was. He said he was looking for a someone, gave a name, and then apologized. When Moreno responded that nobody by that name lived there, Rasmussen opened the front door and the man walked out and left. The conversation lasted a few minutes. Moreno and Rasmussen looked at him during most of the conversation.

Moreno called 911 after the man left. While she was speaking with the 911 operator, she and Rasmussen went into Garcia's bedroom and found items from Garcia's wallet scattered on the bed. They did not touch the items because they were told not to. Within minutes, the police arrived, and Moreno described the man's appearance to an officer.

Meanwhile, shortly after 3:36 a.m., a police officer stopped Borgen in the 900 block of 30th Street near the 94 freeway because he partially matched the description Moreno had provided, he was walking southbound on 30th Street on the east curb line away from the crime scene, and he was in the vicinity of the crime scene. Another officer searched Borgen and his black backpack. Inside the backpack the officer found a set of pliers, wire cutters, and several flashlights.

Police searched the area near where Borgen was stopped and found (among other things) a credit card belonging to Garcia stashed under a patio area of a house located nearby.

Moreno and Rasmussen participated in a curbside lineup. They identified Borgen as the person they saw walk out of Garcia's bedroom. At trial, they again identified Borgen as the burglar.

*B. The Defense*

The defense rested without presenting evidence.

DISCUSSION

Challenging his first degree burglary conviction and the related sentence enhancement (§ 667.5, subd. (c)(21)), Borgen contends the court prejudicially erred by admitting irrelevant and unduly prejudicial evidence that the police found burglary tools— pliers, wire cutters, and flashlights—in his backpack when he was detained in the vicinity of Moreno's townhouse. This contention is unavailing because we conclude any such error was harmless.

*A. Background*

Prior to trial, defense counsel brought a motion to exclude all of the items found in Borgen's backpack, including "tools (pliers and wire cutters) and three small flashlights." Defense counsel argued that "[a]llowing the jury to hear about these items would unduly prejudice the jury against [Borgen]."

At the hearing on the parties' motions in limine, defense counsel argued that the tools should be excluded because Borgen was "not charged with possession of burglary tools or anything of that effect, and he's not charged with being in receipt of stolen property with regards to any of the items."

The prosecutor opposed the motion, arguing that the items should be admitted because pliers and wire cutters "[were] consistent with somebody who's committing burglaries."

The court ruled the prosecution could introduce evidence that he carried a pair of pliers, wire cutters and several flashlights in his backpack. Implying the burglary tools were relevant on the issues of intent and identity, the court stated:

"As far as the burglary tools, I agree, it doesn't matter if they're charged or not. I think it's relevant. *With someone who's charged with going into someone's house, having tools that may facilitate that kind of crime.* I'm going to allow that. I realize there could be innocent uses of it in the context of this. [¶] Flashlights, I know you talked about the flashlights as well, I would allow those to be talked about." (Italics added.)

#### B. *Applicable Legal Principles*

Only relevant evidence is admissible. (Evid. Code, § 350.) "[A]ll relevant evidence is admissible unless excluded under the federal or California Constitution or by statute." (*People v. Carter* (2005) 36 Cal.4th 1114, 1166 (*Carter*); Evid. Code, § 351.)

"Relevant evidence is defined in Evidence Code section 210 as evidence 'having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.'" (*Carter, supra*, 36 Cal.4th at p. 1166.)

"The test of relevance is whether the evidence tends "'logically, naturally, and by reasonable inference" to establish material facts such as identity, intent, or motive.'" (*Carter, supra*, 36 Cal.4th at p. 1166.) "The trial court has broad discretion in determining the relevance of evidence, but lacks discretion to admit irrelevant evidence." (*People v. Cowan* (2010) 50 Cal.4th 401, 482.)

However, even if evidence is relevant, the court in its discretion may exclude it "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code § 352.)

### 1. *Standards of review*

A trial court's exercise of discretion in admitting or excluding evidence is reviewed on appeal for abuse of discretion and will not be disturbed "except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

A trial court's error under state law in the admission or exclusion of evidence is reviewed for prejudice under *Watson, supra*, 46 Cal.2d at page 836. (*People v. McNeal* (2009) 46 Cal.4th 1183, 1203. Under the *Watson* harmless error test, the trial court's judgment may be overturned only if "it is reasonably probable that a result more favorable to the [defendant] would have been reached in the absence of the error." (*Watson*, at p. 836.)

### C. *Analysis*

In support of his claim that the court prejudicially abused its discretion in admitting evidence he possessed burglary tools when the police detained him, Borgen claims the burglary tools evidence was irrelevant because (1) "the only material fact in dispute was the identity of the burglar"; (2) there was no evidence the burglar forcibly entered Moreno's townhouse; and, thus, (3) "there was no nexus between the tools in [his]

backpack and the entry into the townhouse." In support of this claim of evidentiary error, he primarily relies on *People v. Winters* (1866) 29 Cal. 658 (*Winters*), and also relies on *People v. Wilson* (19650 238 Cal.App.2d 447 (*Wilson*)). Borgen also contends the burglary tools evidence was unduly prejudicial and should have been excluded under Evidence Code section 352.

The Attorney General responds that the court properly admitted the burglary tools evidence, and thus the judgment should be affirmed because (1) Borgen's reliance on *Winters* and *Wilson* is misplaced; (2) the evidence was relevant to prove Borgen entered the townhouse with the felonious intent to commit theft, and to prove Borgen's identity as the burglar; and (3) Borgen has failed to demonstrate that the evidence was unduly prejudicial because he has not shown how the probative value of the evidence was substantially outweighed by the probability that its admission would create substantial danger of undue prejudice within the meaning of Evidence Code section 352.

Because Borgen relies primarily on *Winters*, we begin our analysis with a discussion of that 1866 case. In *Winters*, the Supreme Court upheld the admission and exhibition of evidence of certain burglary tools found in the defendant's carpet bag at the time of his arrest because the record failed to show by what means the entry into the burglarized home was effected. (*Winters, supra*, 29 Cal. at pp. 659, 661.) The *Winters* court began its analysis by stating that "[b]urglarious tools found in the possession of the defendant soon after the commission of the offense may be offered in evidence whenever they constitute a *link in the chain of circumstances which tend to connect the defendant with the commission of the particular burglary charged* in the indictment." (*Id.* at p. 659,



italics added.) Noting that connecting a defendant with a burglary "rarely happens . . . by the direct evidence of witnesses who saw and recognized the defendant in the act" (*id.* at pp. 659-660), the court explained that "in a majority of cases a resort must be had to circumstantial evidence, and any circumstances of which it can be reasonably affirmed that they form links in a chain which tends to connect the defendant with the commission of the burglary are competent evidence against him; but circumstances of which this cannot be affirmed are not." (*Id.* at p. 660.)

Thus, *Winters* explained, "the possession of burglarious tools at or about the time the burglary was committed may or may not be a material fact and competent for the prosecution to prove, and whether it is or not depends necessarily upon the other circumstances of the case. In order to render it material there must be a possible and probable connection between it and the other circumstances given in evidence. *If it appears from the other evidence in the case that the defendant was in the vicinity at or about the time the burglary was committed, and that it was committed by the aid of burglarious tools*, the possession by the defendant, at or about that time, of *corresponding tools* may be shown, because by such evidence it is shown that the defendant had the means to commit the offense in the mode in which it was committed, and because the *possession of the means by which the offence was actually committed is a circumstance which tends* when other circumstances do not oppose but agree with it, *to connect the accused with the commission of the offence.*" (*Winters, supra*, 29 Cal. at p. 660, italics added.)

*Winters* further explained that "if it appears from other evidence that the burglary was *not committed by means of burglarious tools, as where the burglar has entered by an open door or window*, the possession of burglarious tools cannot be shown; because, so far as the case shows, *there is no connection*, probable or possible, between it and an offence confessedly committed without the aid of such tools." (*Winters, supra*, 29 Cal. at p. 660, italics added.)

However, on the facts presented, the *Winters* court was unable to determine by what means the entry into the burglarized home was effected, and thus it affirmed the judgment because it was bound by the presumption that the facts supported the trial court's admission and exhibition of the burglary tools. (*Winters, supra*, 29 Cal. at p. 661.)

Borgen also relies on *Wilson, supra*, 238 Cal.App.2d 447. In that case, a jury convicted the defendant of first degree burglary. (*Id.* at p. 450.) The evidence showed the police caught him fleeing from the scene where a burglary in an apartment had just taken place. (*Id.* at pp. 452-453.) Upon searching the defendant, who was wearing black leather gloves, the police found (among other things) two silver penlights, a black silk sack, a black Navy watch cap, a pair of bolt cutters, and three plastic strips. (*Id.* at p. 453.) On appeal the defendant, relying on the principles explained in *Winters, supra*, 29 Cal. 658, claimed the trial court should have excluded the items because the evidence showed there were no marks on the doorways at the scene of the burglary and, thus, the admission of the items in evidence was improper because they were not shown to have been connected with the burglary. (*Wilson*, at p. 463.)

The Court of Appeal in *Wilson* rejected the defendant's claim and held the evidence of the items found in the his possession at the time of his arrest was admissible. (*Wilson, supra*, 238 Cal.App.2d at pp. 461, 463.) The court explained that the defendant had overlooked a police officer's testimony that the plastic strips taken from the defendant were "burglar tools used to slip a lock on a door; that they were adapted to and in fact could be used to open the door to the apartment building and the door to [the victim's] apartment . . . ; and that they usually do not leave a mark." (*Id.* at p. 463.) Thus, the court explained, the trial court did not err in admitting the plastic strips because such tools are "properly admitted if they are reasonably adapted to the performance of the entry which is in fact effected." (*Ibid.*)

The *Wilson* court further held the other items taken from the defendant were also admissible because they "were not secured in connection with an arrest removed in time and distance from the offense, but one *immediately connected with the alleged illegal act*. Under such circumstances evidence of the possession of articles—sack, gloves, pen-lights, watch cap, and bolt cutters—*reasonably adapted to use in connection with the commission of a burglary whether so used or not*, is properly admissible as showing defendant's felonious intent." (*Wilson, supra*, 238 Cal.App.2d at p. 464, italics added.)

Here, relying on *Winters* and *Wilson*, Borgen asserts "there was no nexus between the tools in [his] backpack and the entry into the townhouse" because "the evidence in the preliminary hearing transcript showed that the burglar entered through an open, front door," and, thus, "[w]ithout evidence of a forced entry, [his] possession of

the tools could not link him to the burglary." Therefore, he asserts, "the fact that a pair of pliers, wire cutters and flashlights *may* be used to facilitate a burglar's entry into a building, as the trial judge found [citation], did not make [his] possession of such tools relevant to any material issue in this case."

We need not decide whether the burglary tools the police found in Borgen's possession in the general vicinity of Moreno's townhouse early in the morning not long after she called 911 were "reasonably adapted to use in connection with the commission of a burglary whether so used or not" (*Wilson supra*, 238 Cal.App.2d at p. 463) and were secured in connection with an arrest "immediately connected with the alleged illegal act [of burglary]" (*id.* at p. 464) such that they were admissible under the reasoning in *Wilson*. Assuming without deciding that the court erred in admitting evidence of the burglary tools taken from Borgen, as he contends, we conclude any such error was harmless under the applicable *Watson* harmless error test because Borgen has failed to meet his burden of demonstrating "it is reasonably probable that a result more favorable to [him] would have been reached in the absence of the error." (*Watson, supra*, 46 Cal.2d at p. 836.) The record contains ample evidence apart from the burglary tools from which a reasonable could jury find beyond a reasonable doubt that Borgen was the burglar and he acted with the requisite felonious intent.

Specifically, the record shows that at around 3:00 a.m. on the night in question, Moreno and her friend Rasmussen encountered the burglar (Borgen) inside of Moreno's townhouse as he was walking out of Garcia's downstairs bedroom, facing them and zipping up a black backpack. All the lights were on downstairs at the time. Moreno and

Rasmussen had a conversation with the burglar during the encounter, which lasted several minutes. They looked at him during most of the encounter. At trial Rasmussen testified that the man was dressed in a green jacket and pants she thought were jeans, and that he was wearing a black do-rag on his head. Moreno testified the man was wearing black pants and a dark jacket that was either dark green or black. When the police arrived at the townhouse after Moreno called 911, she described the man's appearance to an officer.

The record also shows the police detained Borgen at around 3:30 a.m., about half an hour after Rasmussen and Moreno encountered the burglar, in the vicinity of the crime scene and walking away from it. Borgen partially matched the descriptions the victims had provided to the police. Specifically, at the time of his arrest, Borgen was carrying a black backpack in which an officer found the pliers, wire cutters, and flashlights. Borgen was wearing black pants and a green jacket under a brown one, and a do-rag was sticking out of his left pocket. Police found several cards, including a credit card belonging to Garcia, stashed under a patio area of a house located nearby.

The record further shows that Moreno and Rasmussen separately identified Borgen in a curbside lineup as the person they saw walk out of Garcia's bedroom. Prior to being taken to the lineup, the police admonished Rasmussen and Moreno that they were not obligated to identify anyone and that they should not conclude from the fact the police had detained someone that the detained person was guilty. At trial, Rasmussen and Moreno again identified Borgen as the burglar.

Based on the strong foregoing evidence of Borgen's guilt, we conclude that any error by the court in admitting evidence of the burglary tools found on Borgen at the time of his arrest was harmless under the *Watson* harmless error test. (See *Watson, supra*, 46 Cal.2d at p. 836.) Accordingly, we affirm the judgment.

#### DISPOSITION

The judgment is affirmed.

NARES, Acting P. J.

WE CONCUR:

HALLER, J.

IRION, J.